U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: [redacted] Office: California Service Center Date: AUG 7 2000

IN RE: Petitioner: [redacted]
Beneficiary: [redacted]

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

IN BEHALF OF PETITIONER: [redacted]

Public Copy

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Terrance M. O'Reilly, Director
Administrative Appeals Office

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DISCUSSION: The preference visa petition was denied by the Director, California Service Center. A subsequent appeal was dismissed by the Associate Commissioner, Examinations. The matter is now before the Associate Commissioner on a motion to reopen. The motion will be granted, the previous decisions of the director and the Associate Commissioner will be affirmed and the petition will be denied.

The petitioner is a trainer of thoroughbred/quarter race horses. It seeks classification for the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3). The petitioner seeks to employ the beneficiary as a thoroughbred/quarter race horse groom. The director found that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of April 2, 1996, the filing date of the visa petition. The Associate Commissioner affirmed this determination on appeal.

On motion, counsel submits additional evidence in support of the claim that the petitioner had established the ability to pay the proffered wage at the time of filing of the petition.

Section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(3), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled or unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 C.F.R. 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's filing date, which is the date the request for labor certification was accepted for processing by any office within the employment service system of

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the Department of Labor. Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's filing date is April 2, 1996. The beneficiary's salary as stated on the labor certification is $280 per week or $14,560 annually.

On motion, counsel submits a brief, copies of Form 941 Employer's Quarterly Federal Tax Return for 1998, copies of Form W-3 Transmittal of Wage and Tax Statements for 1996, 1997, and 1998, and Form W-2 Wage and Tax Statement for the beneficiary for the years 1996, 1997, and 1998.

The petitioner's 1996, 1997, and 1998 Forms W-3 reflect wages paid of $225,133.57, $210,341.85, and $223,344.99, respectively. The beneficiary's Forms W-2 for 1996, 1997, and 1998 reflect wages earned of $10,022.15, $12,630.50, and $14,407.43, respectively.

Counsel argues:

> The employer has been in the business of training thoroughbred/quarter race horses for over fifteen years. He has the ability to pay the beneficiary's wage from 1996 to the present. . . . These documents demonstrate that the employer had the ability to pay wages in April, 1996 and this ability has continued to the present with the beneficiary still working and receiving wages from the Petitioner.

No additional evidence was submitted to establish the petitioner's ability to pay the wage at the time of filing and continuing to present (i.e. federal income tax returns, audited financial statements, etc.).

The record shows that the beneficiary earned $10,022.15 in 1996 or $4,537.85 less than the proffered wage. The record also shows that the beneficiary earned $12,630.50 in 1997 or $1,929.50 less than the proffered wage, and the record shows that in 1998, the beneficiary earned $14,407.43 or $152.57 less than the proffered wage. Counsel has not explained why the beneficiary was paid less than the proffered wage nor has she provided evidence that the petitioner had additional income with which to pay the beneficiary the proffered wage.

Even though the petitioner submitted its Form 941 and Form W-3 as evidence that it had the ability to pay the wage, there is no evidence that there were additional available funds to make up the difference between the wages actually paid and the proffered wage. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these

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proceedings. See Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).

After a review of the documentation submitted, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered in 1996 and continuing to present. Therefore, the objection of the Associate Commissioner has not been overcome on motion.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not met that burden. Accordingly, the previous decisions of the director and the Associate Commissioner will be affirmed, and the petition will be denied.

ORDER: The Associate Commissioner's decision of May 26, 1999 is affirmed. The petition is denied.